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Attorneys for Creditor UNICAL ENTERPRISES, INC., a California corporation

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

In re:	Chapter 11
Circuit City Stores, Inc., et al.,	Case No. 09-35653 (KRH)
Debtors.	(Jointly Administered)
	RESPONSE OF UNICAL ENTERPRISES, INC., TO DEBTORS' THIRTY-FIRST OMNIBUS OBJECTION TO CLAIMS; DECLARATION OF THOMAS J. WEISS (CLAIM NO. 6555)
	Hearing Date: September 22, 2009 Time: 11:00 a.m. Location: Room 5000

Unical Enterprises, Inc. a California corporation and former vendor to the debtor Circuit City, is a party to an action pending in the Central District of California and in the Ninth Circuit, Case No CV06-6384 GPS. That action asserts claims for breach of contract, based upon certain sales and purchase agreements between Unical and the debtor. Copies of the First Amended Complaint and the related agreements were attached to the proof of claim. The claim consists of $3,370,181 in principal amount, and accrued interest of $683,269 for interest to December 10, 2008.

The action was tried to a hung jury, and the court granted a motion in limine and a Rule 50 motion after trial in favor of defendant debtor, which resulted in judgment in favor

of defendant debtor. That judgment is now on appeal to the Ninth Circuit, but has been stayed as a result of these proceedings.

The specific factual and legal basis of the claim are the facts offered in evidence and considered by the court and jury. These are summarized in the proof of claim. The district court granted the motions on grounds of choice of law and the parol evidence rule. Those issues were briefed extensively in the district court. Unical contends that the district court should not have ruled on the motions as a matter of law and intends to so argue in the Ninth Circuit. Copies of Unical's briefs in opposition to the motions in limine and to the Rule 50 motion are submitted herewith, as Exhibits A, B and C.

Unical intends to seek relief from stay to pursue the appeal, in the absence of other resolution of the claim.

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By _____
THOMAS J. WEISS

Attorneys for Creditor UNICAL ENTERPRISES, INC., a California corporation

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DECLARATION OF THOMAS J. WEISS

I, THOMAS J. WEISS, declare and state:

1. I am an attorney for claimant UNICAL ENTERPRISES, INC., with respect to Claim No. 6555. If called as a witness in this action I could and would testify to the following facts, which are within my personal, first-hand knowledge.

2. I was trial counsel for Unical in the proceedings in Action CV06-6384 GPS, in the Central District of California. I have personal knowledge of the facts stated in this response.

3. Claimant is submitting herewith its response to the Omnibus objection of debtor to certain claims. This objection is being sent by federal express to debtor's counsel September 16, 2009, one day after the date for responses to objections as set forth in the court's order. The reason for the late response is that my office made a calendaring error, based on the deadline for objection to the disclosure statement. Our office received the notice of hearing on the disclosure statement, set for September 22, 2009, with the notice of deadline for objections as 4 p.m. September 18, 2009. Although the body of the Omnibus objection order contains the September 15 deadline, the separate order on objections to the disclosure statement has the deadline of September 18, at 4 p.m., and we calendared that deadline date instead of the September 15 date. Unical does intend to pursue the appeal in the Ninth Circuit and intends to appear at the September 22 hearing on the Omnibus objection order. Unical respectfully requests to be heard on its response to the objection under Bankruptcy Rule 9014(a).

I declare under the penalties of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed September 16, 2009, at Los Angeles, California.

THOMAS J. WEISS

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNICAL ENTERPRISES, INC., a California corporation, Plaintiff, vs. CIRCUIT CITY STORES, INC., a corporation; DOES 1 through 10, inclusive, Defendants.	Case No. CV06-6384 GPS (CTx) Hon. George P. Schiavelli OPPOSITION OF PLAINTIFF UNICAL ENTERPRISES, INC., TO DEFENDANT CIRCUIT CITY STORES, INC.'S NOTICE OF MOTION AND MOTION IN LIMINE CONCERNING PAROL EVIDENCE RULE Pretrial Conference: May 12, 3008 Time: 11:00 a.m. Courtroom: 7 Trial Date: June 3, 2008

The motion in limine re the parol evidence rule should be denied because:

1. The alleged integration clause does not purport to cover the entire commercial relationship between plaintiff and the purchaser Circuit City.

2. The possible application of the parol evidence rule turns on the admission into evidence of preliminary facts which are likely to be disputed, such as the offer of Ms Joan Pinoos to purchase the forecast models, and whether or to what extent Circuit City had discretion to decline to take the forecast models and quantities, and the course of dealing and wage of trade.

/ / /

3. The principles of promissory estoppel may apply if plaintiff reasonably relied on Circuit City's forecasts and vendor policies to purchase inventory which became stranded when Circuit City arbitrarily refused to honor the purchase forecasts.

At page 7, lines 1-3, of its motion defendant appears to acknowledge a key contention of plaintiff, namely that there were reasonable limits on Circuit City's discretion to ignore its own forecasts and cease forecast purchases: "Specifically, Unical agreed to provide a certain quantity of telephones to Circuit City, at a guaranteed price, depending on Circuit City's needs for the product." Plaintiff contends that the relationship was essentially a requirements contract for the identified models, and that the forecasts are the rolling estimates of those requirements. Because Circuit City required plaintiff to be ready to supply quantities of product in accordance with the forecasts, and because Circuit City describes these forecasts as its expected needs, Circuit City cannot claim the right to then treat them as meaningless. It is one thing for Circuit City to say that it cannot guaranty that its needs will match the forecast, but it is quite another thing to say that even if the forecasts are accurate as to Circuit City's needs, at any time and for any reason Circuit City can purchase those requirements from any source it wishes, regardless of harm to plaintiff.

The motion in limine is based on the theory that Circuit City has absolutely no obligation of good faith in making forecasts or disregarding them. That argument flies in the face of commercial reasonableness and is counter to Circuit City's own published material, fairly interpreted.

Even the text of the parol evidence statute relied on by defendant provides a standard of commercial reasonableness as a supplement to the language of forms or other documents. See California Com. C. Section 2202, which provides that confirmatory memoranda "may be explained or supplemented

(a) by course of dealing, course of performance, or usage of trade and

(b) by evidence of consistent additional terms unless the court finds the writing

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to have been intended also as a complete and exclusive statement of the terms of the agreement."

Plaintiff submits that this court should be guided by Hegglade-Marguleas-Tenneco, Inc v. Sunshine Biscuit, Inc (1976) 59 Cal.App.3d 948, which interpreted Section 2202 in circumstances analogous to ours. In that case, the seller sued to enforce sale of a specific quantity of potatoes. The defendant buyer contended that even though the contracts specified 100,0000 cwt sacks of potatoes, in fact the usages of the trade regard the specified quantities only as estimates of the buyer's actual requirements, and that the parties effectively had a requirements contract. Seller objected that "the quantity terms in the contracts are definite and unambiguous," and therefore that the parol evidence rule barred evidence of any usage or custom to consider the amounts as reasonable estimates rather then actual quantities. The appellate court disagreed, holding that evidence of the party's reasonable expectations based on the usage and custom in the trade could be received even though the exact quantities to be purchased were specified in the contract. The court pointed out that "because the marketing contracts are signed eight or nine months in advance of the harvest season, common sense dictates that the quantity would be estimated by both the grower and the processor." 59 Cal.App. 3d 957.

Further relevant to our circumstances, the court noted that its conclusions were consistent with a Fourth Circuit case interpreting Virginia law concerning the same language. Columbia Nitrogen Corporation v. Royster Company (4th Cir., 1971) 451 F.2d 3. In that case, the court held that unless the contract between the parties specifically excludes trade usage to explain or supplement the written terms, such customs or usages are admissible. 59 Cal.App.3d 955.

In our case, there will be abundant evidence that the course of dealing between Circuit City and its vendors does not support the assertion that forecasts are meaningless and that Circuit City has absolutely no obligation to its vendors until and unless a specific purchase order is actually received by the vendor for a specific

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quantity of goods. Indeed, Circuit City would go beyond even such a commercially unreasonable interpretation, arguing that even if it does purchase the goods it could arbitrarily return them for any reason or no reason.

Circuit City does not even mention, let alone distinguish, this clearly relevant case. Hegglade was cited with approval for the same proposition in New West Fruit Corporation v. Coastal Berry Corporation (1991) 1 Cal.App.4th 92, 99. The court there observed, "As in any contract interpretation task. . .we must look to the reasonable expectations of the parties. . . An 'agreement' under the Uniform Commercial Code, 'means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. . .' (Sec. 1201, subd. (3); Sec. 2202; Sec. 2208; see Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc. (1976) 59 Cal.App. 3d 948, 955.)"

Our case is a simple variation of the circumstances of Hegglade, but presents exactly the same principle. The buyer (Circuit City) insists the specified quantity is effectively zero, because protective language used in Circuit City's forms arguably disclaims any obligation to purchase any particular quantity, while the seller (Unical) is contending that the only reasonable interpretation of the contractual relationship, including course of dealing, supplemental promises, and custom of the trade, is that Unical will supply Circuit City's requirements, measured by some good faith standard, evidenced in part by written forecasts.

Moreover, Circuit City's integration clause language does not even purport to cover the entire contractual arrangement between plaintiff and defendant. The February 3, 2004 letter agreement recites that its purpose is "to establish the terms upon which Unical Enterprises will sell and Circuit City Stores, Inc. will buy the products set forth on the attached Exhibit 1 ('Products')." Exhibit 1 specifies three models and corresponding quantities of each. The letter, at the last clause under "miscellaneous," says "This Agreement, including any documents incorporated

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herein, constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes any prior agreements between the parties with respect to such subject matter." The "subject matter hereof," is models 35800, 35807, and 35808, in the respective quantities of 42,000, 30,000 and 25,000. Nothing more. Nor does this contract exclude the supplemental provisions of Section 2202 of the Commercial Code, which is the same in both Virginia and California. Nor is there any reference to the forecasts as to any models. Rather, page 1 of the document says simply, "Circuit City shall purchase the Products at the price set forth on Exhibit 1." Yet Circuit City tries to argue that this really means Circuit City doesn't have to purchase anything.

For purposes of its motion, defendant must admit that the parol evidence proffered by Unical will tend to show that Circuit City made an oral commitment on the other three models, at or about the same time it made the commitment on the three models mentioned in the agreement. There is nothing inherently contradictory to the letter agreement for Circuit City to agree, as part consideration, to purchase its requirements of certain other models from Unical. In fact, if Circuit City is contending that any such agreement regarding the forecast quantities was not part of the February 3 agreement, but was separate, then there is no rationale for using the February 3 agreement to bar evidence of those other agreements. Circuit City appears to recognize this problem in its description of plaintiff's claims as "tethered" to the February 3 letter. Of course, the limited integration clause says nothing about other agreements which are "tethered" to the February 3 agreement.

Circuit City also tries to argue that the forecasts were "merely" "a planning tool." But of course Circuit City does not cite any portion of the February 3, 2004, letter, nor any other documents by which Circuit City so belittles its own forecasts. Circuit City argues that since Mr. Cottogio recognized that the forecasts are not an unequivocal commitment to purchase the forecast quantities, somehow he has admitted that the forecasts are meaningless and that the vendor, Unical, should

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therefore just assume they are false. But the truth is that the evidence will show that the parties treated the forecasts seriously. For instance, the evidence will show that one of the documents the direct vendor import guide, in fact describes the order forecast as one of the "Key Steps for Vendor," and the description of the role of the forecast in the supply process definitely does not tell the vendor that he should not take the forecasts seriously. In fact, the contrary is true. The vendor must rely on them to maintain capacity to fill orders.

Non-party witness Bruce Penslar testified at his deposition to the effect that he was familiar with Circuit City's forecasts, and that the rolling forecasts could be revised upward or downward within a range of plus or minus 20 percent, but not that they were meaningless or could be disregarded entirely. In fact, the Circuit City personnel insisted that the vendors maintain capacity to deliver per the forecasts otherwise they could be terminated as suppliers. See deposition of Penslar, 37:22-40:2; 44:2-45:7.22:12-24:2; 27:20-29:18.

Circuit City had a policy of evaluating and ranking its suppliers as to how well they maintained the delivery schedules based on the forecasts. Circuit City should not now be heard to disclaim the materiality of the very same forecasts to which they required their suppliers to commit.

Finally, the motion fails to address the established California jurisprudence on application of the parol evidence rule to proffered evidence. In sum, it holds that you cannot apply the parol evidence rule in a vacuum, but only in the context of provisional consideration of specific evidence, to determine whether the evidence supports a meaning to which, in the entire context of circumstances, is a reasonable one. Tahoe National Bank v. Phillips (1971) 4 Cal. 3d 11.

Circuit City also claims to rely on selected snippets from the "Supply Chain Standards" and "Direct Import Guide" documents, without even attempting an evaluation of them as a whole. Suffice it to say that the more documents and standards which Circuit City attempts to somehow incorporate by reference into the

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relationship with its vendors, the more complicated that relationship becomes and the more open to ambiguity and modification.

For all of the foregoing reasons, the motion should be denied.

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By: _____
Thomas J. Weiss

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DECLARATION OF THOMAS J. WEISS

I, THOMAS J. WEISS, declare and state:

1. I am an attorney for plaintiffs in the above-entitled matter. If called as a witness in this action I could and would testify to the following facts, which are within my personal, first-hand knowledge.

2. Attached hereto as Exhibit 1 are true and correct copies of the following pages from the deposition of Bruce Penslar, taken March 14, 2008:

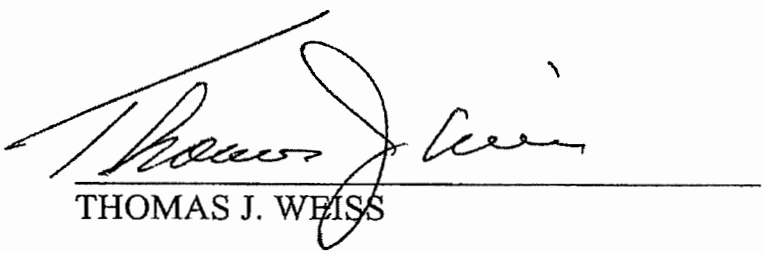
Page 22, line 12 to page 24, line 2

Page 27, line 20 to page 29, line 18.

Page 33, line 2 to page 45, line 7

Page 37, line 22 to page 40, line 2;

I declare under the penalties of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on September 16, 2009, at Los Angeles, California.



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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNICAL ENTERPRISES, INC., a California corporation, Plaintiff, vs. CIRCUIT CITY STORES, INC., a corporation; DOES 1 through 10, inclusive, Defendants.	Case No. CV06-6384 GPS (CTx) Hon. George P. Schiavelli OPPOSITION OF PLAINTIFF UNICAL ENTERPRISES, INC., TO DEFENDANT CIRCUIT CITY STORES, INC.'S NOTICE OF MOTION AND MOTION IN LIMINE REGARDING APPLICATION OF FOREIGN LAW Pretrial Conference: May 12, 3008 Time: 11:00 a.m. Courtroom: 7 Trial Date: June 3, 2008

Defendant's Motion in Limine Regarding Application of Foreign Law should be denied. It is not a motion in limine at all and does not request that the court exclude any particular evidence. The motion in limine is a 12(b)(6) motion or a motion for summary judgment motion in disguise. Motions in limine address evidentiary questions and are inappropriate devices for resolving substantive issues. See 75 Am.Jur.2d Trial § 99 (2004) (explaining that motions in limine are improper vehicles to raise motions for summary judgment or motions to dismiss because "[m]otions in limine are not to be used as a sweeping means of testing issues of law,"

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Provident Life & Accident Ins. Co. v. Adie, 176 F.R.D. 246, 250 (D.Mich.1997) (motion in limine cannot be used as substitute for motion for summary judgment)).

Defendant made no 12(b)(6) motion to dismiss the cause of action for promissory estoppel, and the time do so has long since passed. Likewise, defendant made no motion for summary judgment as to this issue, and again, any such motion is untimely at this juncture.

Even if considered on its merits, the motion should be denied. Defendant's recital of its version of the facts at this point is just argument. The allegations of the complaint do not compel a conclusion that Virginia law applies to all aspects of the relationship between the parties. As explained in the response to the motion in limine regarding the parol evidence rule, the February 3, 2004 letter contains only a partial integration clause, that is, it does not purport to express all of the terms of all of the agreements between the two parties, but only "with respect to the subject matter hereof," which is models 35800, 35807, and 35808, in the respective quantities of 42,000, 30,000, and 25,000. It does not evem purport to apply a choice of law provision to all related or "tethered" agreements. The evidence will show that there were various deals between the parties over the years, and that there were various purchase transactions which were logged into the Circuit City order inventory system as separate "deal" numbers. (See Tammy Fullam deposition, pages 69-75, attached to the declaration of Thomas J. Weiss as Exhibit 1.)

Finally, the motion does not cite any authority by which a California court has decided that Section 90 of the Restatement, 2d of Contracts is not a fundamental policy of the state of California. California cases consistently recognize the theory as necessary to avoid injustice. See Drennan v. Star Paving Co. (1958) 51 Cal. 2d 409; Kajima/Ray Wilson v. LA County MTA (2000) 23 Cal.4th 305, 315-316; Signal Hill Aviation Co. v. Stroppe (1979) 96 Cal.App.3d 627. In Hall v. Superior Court (1983) 150 Cal.App.3d 411 the court did find that the benefit of California's corporate Securities Law of 1968 is important enough to override a choice of Nevada law.

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Such a determination appears to require a consideration of the factual circumstances. The court in Discover Bank v. Superior Court (2005) 134 Cal.App.4th 886, 893-894 said, "We are not aware of any bright-line rules for determining what is and what is not contrary to a fundamental policy of California. Comment g to Restatement, section 187itself says that 'no detailed statement can be made of the situations where a 'fundamental policy. . . will be found to exist.'"

In A&M Produce v. FMC Corporation (1982) 135 Cal.App.3d 473, 487, n. 12, the court did note that even in a contact between merchants under Article 2 of the UCC, unconscionability is "a doctrine fundamental to the operation of contract law, irrespective of any particular application." Unconscionability is conceptually close to promissory estoppel.

For all the foregoing reasons, the motion in limine regarding the application of Virginia law to promissory estoppel should be denied.

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By: _____
Thomas J. Weiss

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DECLARATION OF THOMAS J. WEISS

I, THOMAS J. WEISS, declare and state:

1. I am an attorney for plaintiff in the above-entitled matter. If called as a witness in this action I could and would testify to the following facts, which are within my personal, first-hand knowledge.

2. Attached hereto as Exhibit 1 are pages 69 through 75 of the deposition of Tammy Fullam taken February 22, 2008.

I declare under the penalties of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 16, 2009, at Los Angeles, California.

THOMAS J. WEISS

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Attorneys for Plaintiff UNICAL ENTERPRISES, INC., a California corporation

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNICAL ENTERPRISES, INC., a California corporation, Plaintiff, vs. CIRCUIT CITY STORES, INC., a corporation; DOES 1 through 10, inclusive, Defendants.	Case No. CV06-6384 GPS (CTx) Hon. George P. Schiavelli PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT UNDER RULE 50 Trial Date: June 3, 2008

1. SUMMARY OF ARGUMENT.

The Rule 50(a) motion is without merit for several reasons:

1. The textual evidence is strong, if not determinative, that the defendant was obligated to buy the goods. Defendant says only that plaintiff relies on the language of the contract which says "will buy" and "shall buy," but defendant omits mention of the further clause which says three times that in case of any conflict between the terms incorporated by reference and the provisions of the letter agreement, "this Agreement will control."

2. In order to argue the contrary, defendant has to contend that the language "shall buy" and "will buy" is ambiguous, and has to be interpreted in light of extrinsic evidence. In fact, it was Circuit City which tried to make that argument, offering

evidence, for instance, that the Unical personnel thought it was important to have a purchase order before shipping goods. That testimony actually was perfectly consistent with plaintiff's interpretation of the Agreement since the purchase order is the means of execution of the purchase not the document creating the purchase obligation. But the jury must weigh that evidence, if it is to be considered at all. Mr. Cotaggio also testified that Circuit city never disclaimed the obligation to purchase. Such evidence cannot be weighed in a Rule 50(a) motion for judgment as a matter of law.

3. Whatever the cancellation and return rights in the contract, the evidence was that the defendant never did resort to the returns or cancellations provisions, and the fact that those options existed actually support the reality of the "will buy" and "shall buy" clauses of the contract.

4. Defendant's argument that the damages limitations clause effectively makes the contract illusory is self-defeating. At trial, defendant did not so argue and did not provide evidence that the plaintiff was not damaged. The remedies provisions of Article 2 are to be liberally interpreted. In any event, there was ample evidence of actual damages.

Defendant admits that the motion under Rule 50 is one made on questions of law only, not on the weighing of evidence or evaluations of credibility. McSherry v. City of Long Beach (9th Cir., 2005) 423 F.3d 1015, 1020 (standard for motion under Rule 50 is same as motion for summary judgment, but Rule 50 is not intended as an alternative mechanism for obtaining summary judgment). Here a scrutiny of the explicit terms of the contract support plaintiff's contention that the agreement is for the purchase of goods, not for the unilateral obligation of plaintiff to supply the goods for sale and the unilateral right of defendant to do nothing or anything it wanted.

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2. THERE IS NO EXPLICIT LANGUAGE ABSOLVING DEFENDANT ALL OBLIGATIONS TO BUY PRODUCTS.

Defendant's Rule 50 motion is based primarily upon the contention that the contract documents on their face do not obligate the defendant to buy any goods, and that a jury could not find otherwise. Defendant, however, does not specifically cite any provisions of the February 3, 2004 Letter Agreement, Exhibit 15, which defendant claims are dispositive of plaintiff's claim. Instead, defendant only argues generally that the supplemental materials cross-referenced in the Letter Agreement negate any obligation of defendant actually to purchase any goods. Defendant argues that Unical agreed to the "terms of the eRFP," and the terms of the "Purchase Order" and "Supply Chain Standards and Terms and Conditions," which defendant contends somehow excuse defendant from any and all purchase obligations.

Although defendant also notes that the agreement allowed defendant to terminate the Agreement at any time "upon 30 days' written notice to vendor," defendant admits that defendant never gave any such written notice. Defendant further notes that the agreement gave the defendant the right to return any inventory for reimbursement at the price paid. The Agreement provides a number of circumstances under which the defendant can return goods, but none of them apply. Moreover, defendant is not relying on any such provision because there is admittedly no evidence that defendant ever returned any of these goods. It just failed and refused to purchase them.

Defendant argues essentially that none of these provisions really has any meaning because the true meaning of the agreement is simple: that defendant undertakes no obligation at all by virtue of the contract. That makes no sense, and is not in fact supported by the text.

Moreover, the text on page two of the Agreement does not in fact contain a plenary right to return inventory. That provision is part of the termination for cause paragraph on the fourth page of the Agreement, and does not refer to the clause on

page one which would allow defendant the right to terminate for no reason under the 30-day notice provision. But that doesn't matter anyway, because defendant admits there never was a written notice of termination. Contrary to the explicit text of the Agreement, defendant contends that it doesn't matter "when the Agreement terminated, and whether it terminated through expiration of the twelve-month period or by Ms Fullam's written notice provided on July 8, 2005." But that is merely a rhetorical attempt to sweep the dirt under the rug. The July 8 e-mail does not even purport to be a notice of termination, nor give any 30-notice of any kind. Nor is it reasonable to construe the Agreement as allowing a written notice of termination after the 12-month term to wipe out the previous obligation to purchase goods during that term.

3. THERE IS SUBSTANTIAL EVIDENCE OF DAMAGES.

The seller remedies provisions of the Uniform Commercial Code, both in California and in Virginia, give a wide range of remedies to the aggrieved seller, the general aim being to put the aggrieved seller in the position it would be had the buyer performed. Sections 2703, 2704, 2705, 2706, 2708, 2709. Defendant argues that as a matter of law there is insufficient evidence of damages. But this argument really only amounts to an attempt to discredit the testimony of Ms Tsui, who testified without objection that Unical incurred at least $111,728 in damages, measured by the lost revenue less the amounts saved by reason of the breach. In arguing that the plaintiff had cancelled 8,484 units on order from the factory, and thus could not have been damaged, defendant simply ignores the testimony of both Frank Liu and Becky Tsui that the purchase order amendments did not change the total quantity but only the allocation of the total quantity purchased in 2004 among purchase orders. In fact, Ms Tsui explained that was why the amendments to the purchase order were made a year later, in June 2005, after the full quantity of 64,516 had already been received. Mr. Liu testified without objection that the factory did not allow Unical to cancel quantities which it had already manufactured, for the obvious reason that the

manufacturer would have to take the loss of unsold inventory. Thus, Unical clearly supports its position on this issue clearly with competent evidence, which the jury is entitled to evaluate for itself.

Similarly, any argument over evidence of commercial reasonableness is for the trier of fact. Defendant does not cite any authority requiring Unical to prove commercial reasonableness (which is not even defined in the Uniform Commercial Code) of any resale as a prerequisite to recovery of damages by an aggrieved seller. Moreover, the evidence was that defendant was trying to sell the units at $10, so Circuit City can hardly complain that Unical later sold them for $12. Further, under Section 2706(6) the seller is not accountable for any profit on resale.

Ms Tsui testified that Unical had made efforts to sell the goods, but that the price declines had made the remaining inventory less valuable. In fact, the evidence was that at one point Circuit City had advertised the model for sale for $10, which very much upset Mr. Cottogio. The most recent sales of the remaining goods by Unical were at $12 per unit, and defendant did not even attempt to show that was unreasonable. Circuit City's argument that the plaintiff's website displayed a retail price of $49.99 for the model is not an indication of the value of the goods, since, as Ms Tsui explained, there were no sales at that price and the only reason for keeping that published sale was to avoid competing with customers. Indeed, it was Ms Fullam who asserted that she could not sell the goods profitably given the contract price.

Similarly, the arguments about whether and when the goods were identified to the contract, and whether Circuit City had notice that Unical intended to sell the goods (the statute does not require notice of the actual sale) or even if not what difference it made, are all questions of fact. The Uniform Commercial Code allows the identification to be by any means agreed on (Section 2501), including the designation of quantities, source and amount via the letter of credit agreement, which is Exhibit16, and also provides that identification can be made after the breach unilaterally by the aggrieved seller (Section 2704). When the parties specified the

model quantities, the

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price and the manufacturer and provided for a letter of credit to cover them, that was identification.

In sum, the evidence is ample to support a conclusion that plaintiff was damaged by the breach. In any event, defendant concedes that substantial evidence supports at least $50,332.80, so that there can be no judgment in favor of defendant on the theory that Unical had no damages.

Lastly, as a kind of throw-away argument, defendant argues that the limitation of liability clause might bar the damages claimed. However, defendant puts the shoe on the wrong foot, arguing that "Unical offered no proof of explanation of whether the amount it claims for damages includes consequential or incidental damages." If defendant were relying on that clause, proof of its applicability would be defendant's burden. In fact, defendant did not even argue the applicability of this clause to the jury, for reasons which are not hard to discern. Again, what defendant is trying to suggest, without actually saying so, is that the limitation of liability clause would catch all damages, so that the result would be that Circuit city would never be liable for anything regardless of whether or how it performed.

4. CONCLUSION.

The essence of the agreement is explicit on page 1:

1. Circuit City "will purchase" and "shall purchase" the "Products" defined on "Exhibit 1 hereto" which include "25,000" units of "model 35808."

2. "Unical Enterprises will sell and Circuit City, Inc., will buy the products set forth on the attached Exhibit 1 ('Products')."

3. "Circuit City shall purchase the Products at the price set forth on Exhibit 1."

4. In case of any conflict between the terms of the matters incorporated by reference, including the Purchase Orders and the Vendor Supply Chain Standards and

the eRFP, "this Agreement will control." That phrase is repeated three times, under "Program" with respect to the eRFP, under "Orders" with respect to the provisions of the Purchase Order, and under the "Supply Chain Standards" with respect to the provisions of the Supply Chain Standards.

Moreover, the defendant's interpretation beggars common sense and offends the fundamental principle that the provisions of the contract be construed together and that constructions which make many of the provisions meaningless be avoided. That would be the result if Circuit City's interpretation were to prevail. It would mean that all of the descriptions and qualifications on the duties of defendant are meaningless because the true meaning of the contract is that Circuit City simply has no obligations thereunder.

Here, a fair scrutiny of the explicit terms of the contract supports plaintiff's contention that the agreement is for the purchase as well as the sale of goods, and not for the unilateral obligation of plaintiff to supply the goods for sale and the unilateral right of defendant to purchase nothing. For this reason, the court should in fact render judgment in favor of Unical Enterprises, Inc., under Rule 50(a) given the explicit text. Nothing in Rule 50 prevents the court from finding adversely to the moving party on the very issue limned by the motion where, as here, the jury does not return a verdict on that issue because of the mistrial. Rule 50(b)(3) allows the court to direct the entry of judgment as a matter of law on that point. Only if the court finds the terms ambiguous could the trier of fact, after weighing evidence, (which cannot be done under Rule 50), find for the defendant. That, if necessary, must be done in a new trial.

WEISS & HUNT

By: _____
Thomas J. Weiss

Attorneys for Plaintiff UNICAL ENTERPRISES, INC., a California corporation

PROOF OF SERVICE OF DOCUMENT
In re Circuit City Stores, Inc., et al.
No. 08-35653 (KRH)

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 1925 Century Park East, Suite 2140, Los Angeles, California 90067

The foregoing document described as **RESPONSE OF UNICAL ENTERPRISES, INC., TO DEBTORS' THIRTY-FIRST OMNIBUS OBJECTION TO CLAIMS** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner indicated below:

☐ **1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On September 16, 2009, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

☐ Service information is on the attached page

☒ **2. SERVED BY U.S. MAIL OR OVERNIGHT MAIL**(indicate method for each person or entity served):

On September 16, 2009, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. **Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.**

☒ Service information is on the attached page.

☐ **3. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL** (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on September 16, 2009, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. **Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.**

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: September 16, 2009 Karen Genova
Type Name

Karen Genova
Signature

WEISS & HUNT
1925 CENTURY PARK EAST • SUITE 2140 • LOS ANGELES, CALIFORNIA 90067

In re Circuit City Stores, Inc., et al.
Chapter 11 - Case No. 08-35653 (KRH)

Attachment

Gregg M. Galardi, Esq. Ian S. Fredericks, Esq. SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP One Rodney Square P. O. Box 636 Wilmington, Delaware 19899-0636 (302) 651-3000	Counsel to the Debtors and Debtors in Possession
VIA OVERNIGHT DELIVERY	
Chris L. Dickerson, Esq. SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP 155 North Wacker Drive Chicago, Illinois 60606-1720 (312) 407-0700	Counsel to the Debtors and Debtors in Possession
VIA OVERNIGHT DELIVERY	
Dion W. Hayes (VSB 34304) Douglas M. Foley (VSB 34364) MCGUIREWOODS LLP One James Center 901 E. Cary Street Richmond, Virginia 23219 (804) 775-1000	Counsel to the Debtors and Debtors in Possession
VIA OVERNIGHT DELIVERY	

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September 16, 2009

Clerk of the Bankruptcy Court
United States Bankruptcy Court
701 East Broad Street, Room 4000
Richmond, VA 23219

Re: Debtor: Circuit City Stores, Inc., et al.
Case No. 09-35653 (KRH)

Gentlemen and Ladies:

Enclosed is an original and two copies of Response of Unical Enterprises, Inc., to Debtors' Thirty-First Omnibus Objection to Claims; Declaration of Thomas J. Weiss (Claim No. 6555).

Please file the original and one copy for us and return a conformed copy in the envelope provided. If you do not require an additional copy to file, please discard that copy. If possible, we would appreciate a copy returned via FedEx (envelope enclosed), but if you do not have access to FedEx, please return by mail.

Should you have any questions or comments, please call.

Thank you for your anticipated courtesy and cooperation in this matter.

Very truly yours,

Karen Genova,
Assistant to THOMAS J. WEISS

/kmg
Enclosures